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## Liberty, Justice . . . and Experts For All\*

Mary F. Moriarty\*\*

Learned Hand once said, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."<sup>1</sup> Yet we ration justice when we deny criminal defendants access to the tools of an effective defense because they are poor. This happens when federal and state statutes give judges the discretion to allocate a limited amount of compensation to investigators and experts for use in the defense of indigents accused of crimes. A lawyer who represents a poor client must ask the trial judge to authorize funds for investigators and experts. Even if the judge authorizes the full amount of money available under the statute, it is often insufficient to prepare an adequate defense. Because these statutes limit access to the investigators and experts necessary to present a defense, they effectively deprive poor defendants of due process under the fourteenth amendment. The statutes also compromise the indigent defendant's sixth amendment right to confrontation when they prevent effective cross-examination because funds are not available to consult with an investigator or expert. Finally, these statutes impair the autonomy of the defense lawyer and the integrity of the adversarial system when judges use them as a license to interfere with defense strategy.

### I. The Need for Investigators and Experts

If investigators and experts were not necessary to prepare an effective criminal defense, any debate over the merits of these statutes would be superfluous. There is general agreement that investigators and experts are important.<sup>2</sup> In 1956, Judge Jerome Frank wrote:

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\* This article is dedicated to the memory of Professor Irving Younger.

\*\* J.D. 1989, University of Minnesota Law School; B.A. 1986, Macalester College. Professor Judith T. Younger contributed invaluable advice and insight.

1. Address by Learned Hand, Legal Aid Society of New York 75th Anniversary Dinner (Feb. 16, 1951).

2. There are some dissenters. See Norman Lefstein, *Criminal Defense Services For The Poor* 37-38 (May 1982). In a survey of indigent defense systems in San Francisco, Lefstein found that many judges view investigators and experts as a low priority. Lefstein reported that public defenders are often discouraged from requesting investigators and experts because their applications are frequently denied.

The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist. . . . In such circumstances, if the government does not supply the funds, justice is denied the poor and represents but an upper-bracket privilege.<sup>3</sup>

The American Bar Association agrees. Its comprehensive standards for case preparation include the use of investigators and experts. Under ABA Standard 4-4.1, a defense lawyer must conduct a prompt investigation of all circumstances surrounding each case and explore any avenue that might uncover a relevant fact.<sup>4</sup> Even the client's admission of guilt will not relieve the lawyer of the responsibility to investigate because the act committed by the defendant may not coincide with the elements of the crime.<sup>5</sup> The comment to this standard says simply, "Facts form the basis of effective representation."<sup>6</sup> To gather these essential facts, the lawyer must conduct a thorough investigation. Only by locating witnesses and learning as much as possible about their character and background will a lawyer be able to take advantage of cross-examination.<sup>7</sup>

To use these facts effectively, the lawyer may have to consult an expert to educate himself<sup>8</sup> about scientific evidence or to appear as a defense witness. ABA Standard 5-1.4 states that experts and investigators must be available at trial, and at any other phase of the proceeding where they are necessary.<sup>9</sup> According to the ABA drafters, quality representation is wasted at trial without the benefit of necessary supporting services.<sup>10</sup>

Preparation is the cornerstone of effective advocacy.<sup>11</sup> And

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3. *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *vacated*, 352 U.S. 565 (1957). See also H.R. Rep. No. 864, *reprinted in* 1964 U.S. Code Cong. & Admin. News 2990, 2993. In a letter to House Speaker John McCormack, President John F. Kennedy wrote of the urgent need for the Criminal Justice Act of 1964: "Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow." *Id.*

4. ABA Standards For Criminal Justice 4-4.1 (2d ed. 1980 & Supp. 1986) [hereinafter ABA Standard].

5. *Id.*

6. *Id.* comment.

7. *Id.*

8. I use masculine pronouns in this article for style and simplicity, not to exclude or discriminate against women. For further discussion, see Irving Younger, *The English Language is Sex-Neutral*, 72 A.B.A. J. 89 (1986).

9. ABA Standard 5-1.4, *supra* note 4.

10. *Id.* comment.

11. Recently, Edward Bennett Williams commented, "It's been said a thousand

an effective advocate must be an able direct and cross-examiner. To accomplish this task, the diligent lawyer will prepare before the trial begins with one theory of the case in mind.<sup>12</sup> Any evidence introduced by the lawyer at trial develops a narrative around that theme, and cross-examination, if done at all, merely elicits the information he needs to deliver an effective summation.<sup>13</sup> The author of a recent article in *Litigation* wrote that interviewing adverse witnesses before trial is imperative.<sup>14</sup> In his opinion, meticulous preparation enables the lawyer to effectively develop cross-examination, and to preclude improper or damaging testimony entirely *via* a motion *in limine*.<sup>15</sup>

Federal courts take the same view. In *United States v. Patterson*,<sup>16</sup> the Fifth Circuit Court of Appeals ruled that the defendant was entitled to retain a fingerprint analyst after fingerprint evidence had been introduced against him. A defense expert was required, according to the court, because "[t]he assistance of an expert undoubtedly would have facilitated Patterson's cross-examination of the government's expert."<sup>17</sup>

The Tenth Circuit Court of Appeals reversed a conviction in *United States v. Sloan*<sup>18</sup> after the trial court denied the defendant's request to be examined by a psychiatrist of his own choice. Although a state doctor had examined Sloan, the court held that a non-partisan expert failed to satisfy the requirements of due process:

The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be

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times - the secret of great trial work is preparation, really tedious, really intense preparation. . . . I could go on doing trial work until I was 89 years old, if I didn't have to prepare the case with this terrible, torturous physical and psychic discipline you have to impose upon yourself." Priscilla Anne Schwab, *Interview with Edward Bennett Williams*, *Litigation*, Winter 1986, at 28-29. Irving Younger said of preparation:

The chief, the central principle of advocacy, in all its parts and in every aspect, is preparation. Preparation. Preparation. Whether he has one week, one month, or one year to prepare, the advocate concentrates upon his case to the exclusion of everything else. . . . To what end? That nothing come as a surprise. Everything at trial must be anticipated. Because if it is not, it will go wrong.

Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination*, *Litigation*, Winter 1977, at 18.

12. James W. McElhaney, *The Story Line In Cross-Examination*, *Litigation*, Fall 1982, at 45.

13. *Id.*

14. David Berg, *Cross-Examination*, *Litigation*, Fall 1987, at 25.

15. *Id.* at 27.

16. 724 F.2d 1128 (5th Cir. 1984).

17. *Id.* at 1131.

18. 776 F.2d 926 (10th Cir. 1985).

shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands.<sup>19</sup>

Not only must indigent defendants have investigators and experts, they must be able to choose their own. When it determined that the trial judge erred in denying the defendant a ballistics expert, the Massachusetts Court of Appeals noted, "The judge does not appear to have considered the likelihood that a solvent defendant . . . would prefer to select and employ a competent expert of demonstrated credibility rather than rely on the testimony of a police criminalist of undisclosed qualifications who might well be a hostile witness."<sup>20</sup> One court has gone so far as to hold that the failure of the defense lawyer to seek money for an expert was reversible error. In *Loe v. United States*,<sup>21</sup> the court held that counsel's failure to obtain a private psychiatric examination of the defendant rendered his defense ineffective because the defendant was deprived of the partisan expert to which he was entitled.

Some judges insist that investigators and experts who work for the local police or the state are an adequate substitute for partisans. Unfortunately, these judges use the supporting service statutes to impose "neutral" experts and investigators on the defense, even though the United States Supreme Court has said, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."<sup>22</sup> Justice Cardozo recognized that partisan experts play an essential role in our adversarial system when he noted that a defendant may be "[a]t an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him."<sup>23</sup> Partisan advocacy can only be accomplished when the defense can choose those investigators and experts who will best promote the indigent defendant's interests.<sup>24</sup>

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19. *Id.* at 929.

20. *Commonwealth v. Bolduc*, 411 N.E.2d 483, 486 (Mass. App. Ct. 1980).

21. 545 F.Supp. 662 (E.D.Va. 1982).

22. *Herring v. New York*, 422 U.S. 853, 862 (1975).

23. *Reilly v. Berry*, 166 N.E. 165, 167 (1929).

24. See Note, *Expert Services And The Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 Mich. L. Rev. 1326, 1356 (1986). The author argues that a partisan expert, one who exclusively assists the defense, is constitutionally mandated and essential to due process. In his opinion, the use of neutral experts "subverts the adversary system by shifting the decision from the

While imposing police investigators and state experts on the defense would save the county a few dollars, the long-term cost to the system will be greater. Many police officers have the ability to do an adequate investigation, but because they usually work for the prosecution they will see the case from that perspective. Criminal defendants, however, need investigators who can recognize facts that may be woven into an effective theory of the defense. In the opinion of the chief public defender of the largest urban county in Minnesota, who uses former police officers as staff investigators, it takes approximately six months for them to become able defense investigators.<sup>25</sup> Similar problems arise with experts. Those experts consulted by the prosecution work for the state, which is trying to convict the defendant of a crime. Like police officers, experts employed by the Minnesota Bureau of Criminal Apprehension see the case from the prosecution's point of view. Thus, when judges refuse to authorize funds for partisan experts and investigators, the defendant has forced upon him supporting services insensitive to the subtleties of defense work. Since partisan investigators and experts are an essential component of the adversarial system, judges should not view the role of these professionals as "[e]ssentially that of a disinterested factfinder, rather than one whose job is to help the defense to the extent compatible with professional standards."<sup>26</sup>

## II. The Statutes

Though the language varies from state to state, most statutes require prior approval of expenditures by the court and many establish strict monetary ceilings.<sup>27</sup> A majority of states authorize funds for experts "necessary" to an adequate defense,<sup>28</sup> but the difficulty arises in the courts' interpretation of that language. Even though most state legislatures incorporate some variation of the word "necessary" into their statutes, the courts do not agree on its meaning.

By statute, an indigent accused of a crime in North Carolina

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jury (or judge) to the expert." *Id.* at 1349. Because our adversarial system places great trust in the ability of the jury to evaluate the credibility of any witness, including the expert, the defendant should be allowed to participate in the "battle of the experts" and have the jury decide whose opinion is more credible. *See Id.*

25. Interview with William R. Kennedy, Chief Public Defender of Hennepin County, in Minneapolis, Minnesota (Oct. 6, 1987). Kennedy said that preparing a case without the benefit of an investigator was like "trying to play golf with one arm."

26. Note, *supra* note 24, at 1356.

27. For a complete listing of pertinent state law, see Appendix.

28. *Id.*

is entitled to all necessary expenses of representation and a relationship with his lawyer similar to that which he would enjoy with privately retained counsel.<sup>29</sup> In *State v. Cauthen*,<sup>30</sup> however, the court held that a defendant must show a reasonable likelihood that expert assistance will materially assist the defense. The court wrote that "[a] defendant's constitutional right to effective assistance of counsel does not require that the State 'furnish a defendant with a particular service simply because the service might be of some benefit to his defense.'"<sup>31</sup> This decision is peculiar in light of the North Carolina Legislature's intent that indigent defendants have similar resources for representation as defendants who can afford private counsel. The opinion is also at odds with another court's interpretation of a similar statute. A federal district court in Nebraska wrote that the judge need only be satisfied that defense services are reasonably necessary "to assist counsel in their preparation, not that the defense would be defective without such testimony."<sup>32</sup>

In Kentucky, an indigent defendant is entitled to the necessary services of representation including "investigation and other preparation."<sup>33</sup> The State's courts, however, have not been particularly receptive to defense requests for investigators and experts. The state supreme court wrote, "[W]e know of no statute or principle which would authorize expenditures of public funds to conduct a witch hunt."<sup>34</sup> This was its response to the trial court's denial of a defense lawyer's request for money to collect more data on the improper selection of grand and petit jurors. An expert had found a statistically significant underrepresentation of young people and women in the jury pool and needed more money to gather similar data on race.<sup>35</sup> On appeal, the Commonwealth framed the issue as a request for a second statistician, and that was the question the supreme court chose to address.<sup>36</sup> The case went to federal court, where the Commonwealth withdrew its improper characterization of the issue, admitting it was "careless phrasing."<sup>37</sup>

A defendant was convicted and sentenced to death in *Korden-*

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29. N.C. Gen. Stat. § 7A-450 (1987).

30. 311 S.E.2d 649 (N.C. Ct. App. 1984).

31. *Id.* at 651 (quoting *State v. Parton*, 277 S.E.2d 410, 418 (N.C. 1981)).

32. *United States v. Pope*, 251 F.Supp. 234, 241 (D.Neb. 1966).

33. Ky. Rev. Stat. Ann. § 31.110 (Mitchie/Bobbs-Merrill 1985).

34. *Ford v. Commonwealth*, 665 S.W.2d 304, 309 (Ky. 1983), *cert. denied*, 469 U.S. 984 (1984).

35. Edward C. Monahan, *Obtaining Funds for the Defense of Indigents Accused of Crimes* 8 (1987) [hereinafter *Monahan*].

36. *Id.* at 8.

37. *Id.* at 9.

*brock v. Commonwealth*,<sup>38</sup> another Kentucky case, without the testimony of the psychiatrist who examined him before trial. Although the trial court granted the defendant Kordenbrock's request to retain the psychiatrist, the fiscal court, which is responsible for the appropriation of county funds,<sup>39</sup> refused to pay the expert's bill. When the psychiatrist refused to testify until he was paid for his pre-trial work, the defense was forced to try the case without expert testimony on the defendant's state of mind and other factors that might have mitigated the sentence.<sup>40</sup> On appeal, the court recognized the defendant's right to expert assistance that was "reasonably necessary," but held that the issues on which the psychiatrist was prepared to testify were not relevant to the defense.<sup>41</sup> Before the *Kordenbrock* decision, the United States Supreme Court held in *Ake v. Oklahoma*<sup>42</sup> that the state denied an indigent defendant due process by refusing to supply him with a psychiatrist during his trial and sentencing. Yet the *Kordenbrock* court wrote, "We do not have an *Ake v. Oklahoma* . . . situation here. . . . [A] defendant in a case such as this has [no] right to a psychiatric fishing expedition at public expense, or an in-depth analysis on matters irrelevant to a legal defense to the crime."<sup>43</sup>

A court in Florida saw a similar case in a different light. To gain access to an investigator or expert in that state, a defendant must show that the expert's opinion is relevant to the issues in the case.<sup>44</sup> In *Perri v. State*,<sup>45</sup> the Florida Supreme Court held that the trial court's denial of psychiatric assistance to the defense during sentencing in a capital case required a new sentencing hearing. Even though Perri did not rely on an insanity defense, he was entitled to present expert testimony on factors that might reduce his sentence.<sup>46</sup> His testimony before sentencing that he had, at one time, been in a mental institution was sufficient to allow his law-

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38. 700 S.W.2d 384 (Ky. 1985), *cert. denied*, 476 U.S. 1153 (1986).

39. Ky. Rev. Stat. Ann. § 67.080 (Mitchie/Bobbs-Merrill 1985) (the fiscal court of each county is responsible for appropriating county funds); Ky. Rev. Stat. Ann. § 67.040 (Mitchie/Bobbs-Merrill 1985) (the fiscal court of each county is comprised of the county judge/executive and three county commissioners).

40. The defense intended to present testimony on the defendant's state of mind at the time of the crime and his confession, the influence of drugs, whether the defendant could be rehabilitated, the effect of a severe motorcycle accident, the effect of military service and other factors that might have saved him from the death penalty. *Kordenbrock*, 700 S.W.2d at 387.

41. *Id.*

42. 470 U.S. 68 (1985).

43. *Kordenbrock*, 700 S.W.2d at 387.

44. Fla. Stat. Ann. § 914.06 (West 1985 & Supp. 1988).

45. 441 So.2d 606 (Fla. 1983).

46. *Id.* at 608-09.



yer to consult an expert.<sup>47</sup> Since both courts applied the same statutory language to similar factual situations, it is inconsistent that one defendant received the death penalty while the other got a new sentencing hearing.

Courts in other jurisdictions have twisted the "reasonably necessary" standard in a variety of ways. An indigent defendant in Kansas may have access to funds for necessary services,<sup>48</sup> but courts have held that denial of funds for an investigator was not reversible error when the defense lawyer was unable to estimate the amount of money needed.<sup>49</sup> An Ohio judge will apply a balancing test to determine whether expert assistance is "reasonably necessary" for proper representation.<sup>50</sup> Using this test, the court must balance the value of expert assistance at trial and sentencing against the availability of other devices fulfilling the same function.<sup>51</sup>

Even when the court approves the highest amount of money allowed by statute, it is often insufficient to fashion an effective defense. Several states put specific monetary limits on investigative and expert service expenses. Three hundred dollars is the maximum amount in Minnesota<sup>52</sup> and New Hampshire;<sup>53</sup> two hundred and fifty dollars is the limit in Illinois.<sup>54</sup> In response to criticism that two hundred and fifty dollars was unrealistic, the Supreme Court of Illinois responded that the ceiling was never meant to be a "rigid upper boundary" but that requests for more money "should be scrutinized for abuse with special care."<sup>55</sup> Those states that do not provide an explicit monetary ceiling authorize the court to determine "reasonable" compensation for expert services.<sup>56</sup>

### III. The Federal and Minnesota Statutes

The language of the federal statute is virtually identical to many state statutes. A great deal more legislative history is available for the federal statute because it was part of the highly publicized Criminal Justice Act of 1964. Though many states used the federal statute as a model, there is little state legislative history.

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47. *Id.* at 609.

48. Kan. Stat. Ann. § 22-4508 (1981 & Supp. 1987).

49. *See, e.g.*, *United States v. Frideaux*, 487 P.2d 541 (1971).

50. Ohio Rev. Code Ann. § 2929.02.4 (Anderson 1987).

51. *See, e.g.*, *State v. Jenkins*, 473 N.E.2d 264, 292 (Ohio 1984).

52. Minn. Stat. § 611.21 (1986).

53. N.H. Rev. Stat. Ann. § 604-A:6 (1986).

54. Ill. Rev. Stat. ch. 38, para. 113-3 (Smith-Hurd 1977 & Supp. 1988).

55. *People v. Kinion*, 454 N.E.2d 625, 631 (Ill. 1983).

56. *See* Appendix.

Thus, it is useful to look at the legislative history and judicial interpretation of the federal statute to see how state courts should view similar state statutes. Since the language of the Minnesota statute is prototypical of its state counterparts and closely mirrors the federal statute, it will be the primary focus of this section.<sup>57</sup>

The state of Minnesota is divided into ten judicial districts, each employing public defenders to represent indigents.<sup>58</sup> Every year the chief public defender of each district submits a budget to the State Board of Public Defense for approval.<sup>59</sup> Although the Board has the last word on the budget, money authorized for expert expenses comes directly from the county in which the prosecution originated.<sup>60</sup> When there is not enough money in the district budget to hire staff investigators or experts, public defenders must rely on the statute for funds to retain supporting services. Indigents represented by private counsel may avail themselves of the statute's benefits as well.<sup>61</sup>

Investigators and experts may be obtained under Minn. Stat. § 611.21 when they are ". . . necessary to an adequate defense

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57. Minn. Stat. § 611.21 (1986) provides:

Counsel, whether or not appointed by the court, for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may establish a limit on the amount which may be expended or promised for such services. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained, but such ratification shall be given only in unusual situations. The court shall determine reasonable compensation for the services and direct payment by the county in which the prosecution originated, to the organization or person who rendered them, upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such service rendered to a defendant under this section, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed \$300, exclusive of reimbursement for expenses reasonably incurred.

58. Indigent defendants may also be represented by private counsel. Expenses for investigators and experts authorized by the statute are available to indigent defendants who obtain private counsel. Minn. Stat. § 611.21 (1986).

59. Interview with Judge Kevin S. Burke, Hennepin County District Court, in Minneapolis, Minnesota (Oct. 2, 1987). Judge Burke is chair of the Minnesota State Board of Public Defense. The board consists of seven members.

60. Minn. Stat. § 611.21 (1986).

61. See also *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981). An Iowa court held that the sixth amendment required money for investigative services to indigent defendants even if they are represented by private counsel.

...<sup>62</sup> After an *ex parte* application from defense counsel,<sup>63</sup> the judge must find the services "necessary" to authorize payment of expenses, not to exceed three hundred dollars.<sup>64</sup> Only in unusual situations, where time is of the essence, will the court approve compensation for services obtained before application to the court.<sup>65</sup> Judges attempting to discover the nature of what is necessary to an adequate defense will find little solace in the criteria set forth in the statute. And unfortunately, no Minnesota court has enlightened the legal community with a workable definition of what is "necessary." As one might imagine, some judges view very little as necessary to a criminal defendant.

No state or federal court has successfully articulated those elements fundamental to the defense of every indigent; most insist that a case-by-case analysis is necessary.<sup>66</sup> Many federal courts interpreting similar language in 18 U.S.C. § 3006A(e),<sup>67</sup> have liberally construed the statute. In *United States v. Schultz*,<sup>68</sup> the Eighth Circuit Court of Appeals reversed the defendant's robbery conviction because the lower court refused to authorize funds for independent psychiatric services to assist in preparing an insanity defense. Not satisfied with the statutory definition of "necessary," the court turned instead to the legislative history.<sup>69</sup> In a report on the supporting services section of the Criminal Justice Act the Senate Subcommittee wrote, "[W]e feel that the bar should be bold in seeking subsection (e) authorizations and the bench should be tolerant in entertaining and relatively generous in granting them."<sup>70</sup> Judge Bright then wrote in *Schultz*:

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62. Minn. Stat. § 611.21 (1986).

63. An *ex parte* hearing is essential because the defense is required to reveal strategy. When defense counsel objects to the presence of government counsel during a request for investigators or experts, failure to hold an *ex parte* hearing is prejudicial error. *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972). See also *Mason v. State of Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975). In *Mason*, the appellate court would not rule on the absence of an *ex parte* hearing because defense counsel did not object at trial.

64. Minn. Stat. § 611.21 (1986).

65. *Id.*

66. See, e.g., *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971).

67. 18 U.S.C. § 3006A(e)(1) provides:

Upon request, counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

68. 431 F.2d 907 (8th Cir. 1970).

69. *Id.* at 911.

70. Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,

While a trial court need not authorize an expenditure under subdivision (e) for a mere 'fishing expedition', it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge.<sup>71</sup>

In theory this interpretation seems reasonable. In practice it is not. Since the determination of what is necessary is left to the considerable discretion of the trial court, what is reasonable to one judge may be a "fishing expedition" to another. The appellate courts' unwillingness to substitute their judgments for those of the trial courts worsens this problem.

Thus, a defendant facing a guilty verdict usually encounters a brick wall trying to convince an appellate court that the denial of investigative or expert funds was reversible error. In *Mason v. State of Arizona*,<sup>72</sup> a federal court held that a defendant must show, by clear and convincing evidence, that he was substantially prejudiced by the trial court's denial of investigative funds. To prepare its case against Mason, the state interviewed twenty-three witnesses. When Mason's lawyer asked for an investigator, his request was refused because he would not tell the judge what lines of inquiry he intended to pursue or why he could not personally conduct the interviews.<sup>73</sup> Though the court cited *Schultz* for the liberal construction of requests for pre-trial assistance, it clung to the clear and convincing standard of review and affirmed the conviction.<sup>74</sup>

In a 1986 revision of the Criminal Justice Act, Congress recognized that judicial discretion over allocation of funds was but one problem with these statutes. Critics saw several difficulties with the statute in 1964, though Congress did nothing to alleviate these problems until the Act's revision in 1986. When the House Judiciary Committee originally considered section 3006A(e) of the Criminal Justice Act, a minority expressed concern at the establishment of arbitrary ceilings on compensation for lawyers representing indigents.<sup>75</sup> They saw no justification for explicitly limiting fees, when courts could award appropriate compensation on a case by case basis. A flexible fee schedule was thought to be especially important in complicated cases requiring extensive prep-

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Report of the Criminal Justice Act in the Federal District Courts, 90th Cong., 2d Sess. 220-21 (1969).

71. *Schultz*, 431 F.2d at 911.

72. 504 F.2d 1345 (9th Cir. 1974).

73. *Id.* at 1354-55.

74. *Id.* at 1352.

75. H.R. Rep. No. 864, 88th Cong., 2d Sess. 2, reprinted in 1964 U.S. Code Cong. & Admin. News 2990, 2996-98.

aration, a long trial, and full appellate review.<sup>76</sup> The issue of arbitrary ceilings on investigative and expert fees was not addressed specifically, but arguments set forth in support of flexible counsel fees apply to investigators and experts as well. Because judges make individualized determinations for the authorization of funds in each case, there is no need to set an arbitrary ceiling.

Congress addressed the issue of investigative and expert compensation when it revised the Criminal Justice Act in 1986.<sup>77</sup> In the twenty-one years between the Act's original passage and the 1986 revision, the compensation ceiling remained at three hundred dollars. Federal judges urged revision of the statute because they believed the low ceiling deprived indigent defendants of their sixth amendment right to effective representation.<sup>78</sup> The original three hundred dollar limit remained, however, even though the intent of Congress was to correct an imbalance in the adversarial system resulting from the defendant's lack of resources. In 1986, realizing that inflation required an increase in investigative and expert compensation, Congress raised the limit to one thousand dollars.<sup>79</sup>

Minnesota's statute was enacted in 1965, one year after its federal counterpart. Its three hundred dollar ceiling remains in effect.<sup>80</sup> Since the statute requires judicial approval before the lawyer may contact an investigator or expert, there is no reason to set an inflexible ceiling on the amount a judge may authorize. Any limit, especially one at three hundred dollars, is arbitrary and a denial of due process if it deprives indigents of the basic tools they need for an effective defense. If Minnesota continues to allow the judiciary to exercise discretion over the defendant's use of investigators and experts, the three hundred dollar ceiling should be eliminated.

#### IV. Defenders of Indigents and the Adversarial System

Many state statutes reflect the idea that the professional relationship between a court-appointed lawyer and the indigent defendant should be no different than that between a client and privately retained counsel.<sup>81</sup> Unfortunately, courts often give lip

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76. *Id.* at 2998.

77. H.R. Rep. No. 99-417, 99th Cong., 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6165, 6178.

78. *Id.* at 6165.

79. *Id.* at 6178.

80. Minn. Stat. § 611.21 (1986).

81. See N.M. Stat. Ann. § 31-16-3 (1984) ("A needy person . . . is entitled to be represented by an attorney to the same extent as a person having his own counsel."); Wyo. Stat. § 7-6-104 (1977) (An indigent is entitled "[t]o be represented by an attorney to the same extent as a person having his own counsel."); Nev. Rev. Stat.

service to this legislative intent. Certainly no privately retained lawyer would have to reveal defense strategy well before trial in an attempt to convince a judge that effective representation rests upon obtaining an investigator or expert. The issue of judicial interference with public defenders has been a concern in Minnesota for well over a decade.

The first in-depth evaluation of Minnesota's Public Defender System was done in 1973. That year the Criminal Courts Technical Assistance Project released a report on the public defender system.<sup>82</sup> The lack of full-time investigators throughout the state emerged as the system's greatest deficiency.<sup>83</sup> The evaluation showed that because few districts could afford staff investigators, most public defenders were forced to apply for authorization to retain them under the Minnesota statute. Because some courts were reluctant to authorize funds for investigators, the public defenders simply had to do without them.

The report also concluded that local judicial control over the selection of public defenders and supervisory regulation of their budgets should be eliminated to insure that they could function as independent advocates on behalf of their clients.<sup>84</sup> In its Standards for Criminal Justice, the American Bar Association notes:

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.<sup>85</sup>

The drafters wrote in the comment to this section that when an indigent's lawyer is deprived of the freedom and independence to act on behalf of the client, it is perceived by the defendant and causes "cynicism toward the justness of the legal system."<sup>86</sup>

The Minnesota Evaluation and the ABA Standards advocate the elimination of judicial supervision over public defenders.

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§ 260.040 (1986) ("The professional relationship between court-appointed counsel and indigent defendants under the public defender system is no different than that between a client and privately retained counsel. *Sanchez v. Murphy*, 385 F.Supp. 1362 (D. Nev. 1974)").

82. Criminal Courts Technical Assistance Project Defender Evaluation (July 1973) [hereinafter *Minnesota Evaluation*]. With technical assistance from the National Legal Aid and Defender Association (NLADA), the Criminal Courts Technical Assistance Project of American University, Washington, D.C., conducted an evaluation of the Minnesota public defender system.

83. *Id.* at 52.

84. *Id.* at 53.

85. ABA Standard 5-1.3, *supra* note 4.

86. *Id.* at 5-1.5.

Many state statutes reflect the idea that the lawyer's professional obligations to an indigent remain the same as those to a paying client.<sup>87</sup> Yet these same statutes impose judicial supervision on the selection of investigators and experts, placing the indigent's lawyer in the position of having to justify defense strategy. Since lawyers in private practice are not subject to similar scrutiny, public defenders should not have to endure it either. If the law intends to give indigent defendants the same opportunity to present a defense, their lawyers ought not be subject to judicial whim.

The Minnesota public defender system has improved since the results of the evaluation were released in 1973, yet some problems persist. There were no full-time staff investigators in Minnesota's Fifth Judicial District when the results of the report were published.<sup>88</sup> Although the consultants recommended the addition of two full-time investigative positions in 1973, none exist today.<sup>89</sup> In the Ninth Judicial District, which is comprised of seventeen counties, there is only one full-time investigator.<sup>90</sup> That district has taken one remedial step; the creation of an internship program in which college students do part-time investigation for credit toward graduation.<sup>91</sup> While this program is helpful, nothing can really take the place of a trained full-time defense investigator.

Even the districts which have funds to hire investigators struggle to find experts and pay for their services. Experts in fields relevant to criminal law often work near large cities or universities and are not readily available to aid in the defense of indigents in rural Minnesota.<sup>92</sup> If they are to participate in the defense of indigents in rural areas, they have to be compensated not only for their time but for travel expenses as well. Several years ago, the Ninth Judicial District retained an expert in pediatric neurology at a total cost of over \$10,000.<sup>93</sup> His travel expenses were considerable, but with the neurologist's help the defendant was acquitted of second degree manslaughter.<sup>94</sup>

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87. Minnesota Evaluation, *supra* note 82.

88. *Id.* at 39.

89. Telephone interview with Calvin Johnson, Chief Public Defender of Minnesota's Fifth Judicial District (Nov. 4, 1987).

90. Telephone interview with Paul A. Kief, Chief Public Defender of Minnesota's Ninth Judicial District (Apr. 24, 1988).

91. *Id.*

92. Telephone interview with Fred T. Friedman, Chief Public Defender of Minnesota's Sixth Judicial District (Apr. 14, 1988).

93. Letter from Paul A. Kief to Mary Moriarty (Apr. 26, 1988) (on file with *Law & Inequality*). The case was *State v. Stein Haynes*, No. 85-189 (Sept. 14, 1985).

94. *Id.* The expert was retained to prepare the public defender and to testify at trial. The first trial resulted in a hung jury, the second in an acquittal.

Prosecutors in the same districts have unlimited access to police investigators and experts provided by the Minnesota Bureau of Criminal Apprehension (BCA).<sup>95</sup> The BCA, a state approximation of the FBI, furnishes experts in handwriting, blood, fingerprinting, glass fragments, firearms, tool marks, fibers, and other methods of laboratory analysis to prosecutors on request.<sup>96</sup> If local law enforcement officials ask for help to investigate a crime, the BCA will send a special agent who has had at least four years of investigatory experience.<sup>97</sup> Such an imbalance in resources places indigents' lawyers in an unenviable position. They must try to prepare a defense based on three hundred dollars worth of expert assistance matched against the unlimited resources of the prosecution.

Many commentators, including those who conducted the Minnesota Evaluation, argue that relieving the counties of the burden of indigent defense funding would curb some abuse.<sup>98</sup> In 1982, the ABA's Standing Committee on Legal Aid and Indigent Defendants conducted a hearing on indigent defense funding.<sup>99</sup> Those who testified agreed that state financing was more viable than funding through counties, which are often seriously underfunded.<sup>100</sup> Too many problems arise when county officials, concerned with shrinking budgets and rising costs, resort to alternatives such as contract defense systems.<sup>101</sup> In a contract system, lawyers submit bids from which the county selects those who will serve as public defenders. Often, the county will contract with the lowest bidder, who will work for a flat rate.<sup>102</sup> Since public defenders in a contract system are not paid by the hour, some avoid trials completely and attempt to cut back hours when they reach their estimate. Others subcontract with recent law school graduates who are willing to work for

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95. The state legislature established the Bureau of Criminal Apprehension on July 1, 1927. It functions somewhat like the FBI but at the state level. Telephone interview with Floyd Roman, Assistant Superintendent of the BCA (Apr. 4, 1988).

96. *Id.*

97. *Id.*

98. American Bar Association in cooperation with the National Legal Aid and Defender Association, *Gideon Undone: The Crisis in Indigent Defense Funding* 8, 17 (1982) [hereinafter *Gideon Undone*].

99. *Id.* at 2.

100. *Id.* at 8, 17. In a summary and overview of the hearing, Sheldon Portman reported that the cost of criminal defense services for indigent defendants constitutes only 1.5% of total expenditures for criminal justice matters by state and local governments. State financing was seen as more viable because counties are generally underfunded and opt for systems other than the public defender. Although these alternatives may save money, the quality of those defense services leaves much to be desired. *Id.* at 1.

101. *Id.* at 1. See also Robert Spangenberg, A.D. Davis & P.A. Smith, *Contract Defense Systems Under Attack: Balancing Cost and Quality*, in 39 NLADA Briefcase 5 (1982).

102. *Id.*



less, but who lack experience.<sup>103</sup> Because county courts exercise discretion over funds that come from the county budget, state financing would remove pressure from a judge trying to balance the demands of tight-fisted county commissioners against the needs of indigent defendants.

Minnesota has created a State Board of Public Defense, and with the exception of Hennepin and Ramsey counties, each district's budget is subject to the Board's scrutiny.<sup>104</sup> The Board ultimately decides how much money to allocate to each district, but it invites input from the county commissioners.<sup>105</sup> As most people candidly admit, funds for indigent defendants are not a high priority for public officials concerned with saving money and getting re-elected.<sup>106</sup> Because state judges must also seek re-election and have frequent meetings with county commissioners to discuss finances, they too are subject to political pressures. Judges are placed in the awkward position of carefully scrutinizing expenditures while also deciding how much money to spend for indigent defendants. Under these circumstances, judges should not exercise discretion over investigative and expert services. This is especially true when appellate courts are so reluctant to find abuse of that discretion.

## V. Constitutional Standards

### A. Due Process

In 1985, the United States Supreme Court held that an indigent defendant had been denied due process by the State of Oklahoma when it refused to supply him with a psychiatrist during his trial and sentencing.<sup>107</sup> Accused of first degree murder, Glen Burton Ake had made a preliminary showing that his sanity would be at issue during the trial.<sup>108</sup> So bizarre was Ake's behavior during his arraignment, the trial judge, *sua sponte*, ordered

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103. *Id.*

104. Minn. Stat. § 611.214 (1986).

105. Interview with Judge Kevin S. Burke, *supra* note 59.

106. One headline in a newspaper from Minnesota's Fifth Judicial District read, "Commissioners Vow to Fight Proposed Budget Hike in Public Defender System." New Ulm Journal, June 15, 1988, at A1, col. 1. The prime reason for the increase in the budget was to add one full-time staff investigator. *Id.*

According to Richard Hilleren, Chief Public Defender of Minnesota's Eighth Judicial District, county commissioners become angry when they feel they are losing control over their budgets. He said the bottom line was that the commissioners simply did not want to spend money on indigent defense services. Telephone interview with Richard Hilleren (Apr. 14, 1988).

107. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

108. *Id.* at 72.

him to be examined by a psychiatrist.<sup>109</sup> At that time he was found incompetent to stand trial, but with the aid of drugs he recovered sufficiently to stand trial six weeks later.<sup>110</sup> Although Ake's lawyer showed that his client was indigent and intended to rely on an insanity defense, the lower court refused to authorize expert psychiatric assistance.<sup>111</sup>

The Supreme Court reversed the Court of Appeals affirmation of the lower court.<sup>112</sup> Justice Marshall, for the majority, wrote:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.<sup>113</sup>

In making its decision that an expert was essential to the defense, the Court applied the three-prong balancing test set forth in *Mathews v. Eldridge*.<sup>114</sup> The Court first examined the private interest affected by the state's action.<sup>115</sup> This is the defendant's interest in a fair trial and effective assistance of counsel. Second, the Court analyzed the governmental interest in allowing the defendant the additional safeguard of having an investigator or expert.<sup>116</sup> This is saving money. Third, the Court balanced state interests against the risk of depriving the defendant of this safeguard.<sup>117</sup>

In *Ake*, Justice Marshall described the defendant's interest in the accuracy of a criminal proceeding as "almost uniquely compelling."<sup>118</sup> Where the state and the defendant share an interest in the accurate adjudication of a criminal trial, the government's fiscal interest in denying experts was deemed insubstantial.<sup>119</sup> Marshall went on to examine the role of experts, such as psychiatrists, in the courtroom and quoted one authority as saying that "modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity."<sup>120</sup>

Although the *Ake* court did not specifically address the need

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109. *Id.* at 71.

110. *Id.* at 72.

111. *Id.*

112. *Id.* at 74.

113. *Id.* at 77.

114. 424 U.S. 319, 335 (1976).

115. *Ake*, 470 U.S. at 77.

116. *Id.*

117. *Id.*

118. *Id.* at 78.

119. *Id.* at 78-9.

120. *Id.* at 80.

for other experts and investigators, language in the opinion suggests that it has a more general application. Justice Marshall wrote, "[w]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."<sup>121</sup> Although investigators are not experts as defined by *Ake*, thorough investigation is fundamental whenever an individual has been charged with a crime.<sup>122</sup> Without investigative assistance, a defendant may indeed be deprived of a fair opportunity to present an effective defense.

A recent opinion by the Eighth Circuit Court of Appeals resolved the question of whether the rule in *Ake* extends to non-psychiatric experts. The case of *Little v. Armontrout*<sup>123</sup> involved the use of hypnotically induced testimony during a rape trial. Months after the assault, and with the aid of a police officer "expert" in the art of hypnosis after a four-day training course, the victim was able to identify the defendant Little as her assailant.<sup>124</sup> After Little was convicted, the appellate court remanded for a new trial because the trial court had denied a defense request for an expert in hypnosis to attack the credibility of the police officer.<sup>125</sup> About *Ake*, the court said "[T]here is no principled way to distinguish between psychiatric and nonpsychiatric experts."<sup>126</sup> As a result of *Little*, courts may not selectively exclude fields of expertise as long as the expert opinion is relevant to the defense.<sup>127</sup>

### B. Right to Confrontation

The United States Supreme Court has gradually developed a framework for a defendant's right to confrontation under the sixth amendment.<sup>128</sup> In *Pointer v. Texas*<sup>129</sup> the Court wrote, "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."<sup>130</sup> In that case, the victim of

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121. *Id.* at 76.

122. *Id.*; Note, *supra* note 24, at 1338.

123. 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 2857 (1988).

124. *Id.* at 1241-42.

125. *Id.* at 1245.

126. *Id.* at 1243.

127. *Id.*

128. See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

129. 380 U.S. 400 (1965). The Court held that the confrontation clause of the sixth amendment applies to the states through the due process clause of the fourteenth amendment.

130. *Id.* at 404.

a robbery identified Pointer as the robber during a preliminary hearing at which he had no lawyer. At the trial, the transcript of the eyewitness identification was introduced into evidence because the witness was unavailable. Pointer's conviction was reversed by the Court because he was deprived of his sixth amendment right to cross-examine his accuser.<sup>131</sup> From *Pointer* we learn that cross-examination lies at the heart of the confrontation clause, but the case does not specify the depth of preparation necessary to conduct an effective cross-examination.

Wigmore once referred to cross-examination as "...the greatest legal engine ever invented for the discovery of truth."<sup>132</sup> It can only be effective, however, when the lawyer has engaged in meticulous preparation and knows exactly the information he needs to extract from a witness to support the defense theory of the case. When lawyers represent clients without access to investigative and expert resources they operate at a considerable disadvantage and their clients may be deprived of certain constitutional rights. If this happens because a judge unreasonably refuses to authorize funds available under supporting service statutes, or the statute restricts the money to an unrealistic amount, the defendant's fourteenth and sixth amendment rights may be violated.

## VI. Alternatives

The specific monetary limits are certainly one problem with these statutes, but the amount of money available is irrelevant if the defense lawyer fails to meet the judge's criteria for a threshold showing of need. Although appellate courts say they prefer a liberal interpretation of the statutes, rarely do they reverse convictions for the denial of expert funds. As a result, judges may routinely turn down requests for investigators and experts without fear of appellate disapproval. Often, lawyers who appear in front of these judges stop asking for money and represent indigent cli-

131. *Id.* at 400. See also *Chambers v. Mississippi*, 410 U.S. 284 (1973). Because of Mississippi's voucher rule, under which lawyers could not impeach their own witnesses, Chambers was not allowed to cross-examine his witness who, after confessing to the murder of which Chambers was accused, repudiated his confession on the stand. The Court held that cross-examination was implicit in the constitutional right of confrontation, and while it did not specifically discuss those resources essential to cross-examination, it emphasized that effective confrontation was necessary to "assure the accuracy of the truth-determining process." *Id.* at 295 (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). Justice Powell wrote of the right to confront and cross-examine: "[Its] denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interests be closely examined." 410 U.S. at 295 (citing *Berger v. California*, 393 U.S. 314, 315 (1969)).

132. 5 Wigmore, *Evidence* § 1367 (3d ed. 1940).

ents without the benefit of supporting services. When this happens, a defendant may be represented by a lawyer ill-prepared to try the case. To avoid this problem, supporting service statutes need to be rewritten.

Some argue that the statutes would be more effective if the criteria set forth to determine what is "necessary" were more explicit. Current statutory language is ambiguous and leads to varied interpretations. The Supreme Court's due process constitutional analysis is also ambiguous. The *Ake* court interpreted the constitution to require an investigator or expert when the defendant's sanity would be a significant factor at trial.<sup>133</sup> The Court failed, however, to sufficiently explain what it meant by a "significant factor." To obtain an expert or investigator after *Ake*, the defense lawyer must convince the judge, well before trial, that a "significant factor" does exist.

At least two problems exist with this interpretation of the statute. First, significance is determined on a case-by-case basis and, as always, what is significant to one judge may be a "fishing expedition" to another.<sup>134</sup> Second, lawyers often send out experienced investigators or consult experts hoping to uncover a relevant issue over which there can be a trial. One prominent criminal defense lawyer hires an investigator for any case that might be tried.<sup>135</sup> He said he often tells his experienced investigators to look into a case to see if they can find a relevant issue.<sup>136</sup> If private defense lawyers contact investigators to uncover significant issues, it hardly seems fair to require an indigent to find a significant issue before consulting an investigator.

Other courts engage in a different analysis. Under what is referred to as an "equal protection" test, the court will provide an investigator or expert where, under similar circumstances, one would be retained by a private client.<sup>137</sup> Various federal courts use this test to apply the "necessary for an adequate defense" language in section 3006A(e) of the Criminal Justice Act.<sup>138</sup> Several state courts have adopted this test as well. In *Commonwealth v. Lockley*,<sup>139</sup> the Massachusetts Supreme Court held that "[t]he test

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133. *Ake*, 470 U.S. at 68.

134. Note, *supra* note 24, at 1357.

135. Interview with Joseph S. Friedberg, in Minneapolis, Minnesota (Feb. 23, 1988). Friedberg is credited with being one of the best criminal defense lawyers in Minnesota. Steven F. Haifeh & Gregory White Smith, *The Best Lawyers In America* (1987).

136. Interview with Friedberg, *supra* note 135.

137. Note, *supra* note 24, at 1358.

138. *Id.* at 1358-59.

139. 408 N.E.2d 834 (Mass. 1980).

is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires."<sup>140</sup> The court pointed out that an indigent defendant is not entitled to every supporting service that might be obtained by a defendant with unlimited resources.<sup>141</sup> The indigent defendant need not show, however, that the service would necessarily change the final outcome of the case.<sup>142</sup> This test may seem fair, but judges still retain considerable discretion to decide whether they think a paying client would consult an investigator or expert. In any event, an alternative that gives judges discretion can, and will be, abused by some of them.

One solution would allow defense lawyers to obtain investigators and experts on their own initiative and give the county the opportunity to challenge the expenditure after the trial. When the county feels that an expense is frivolous, it can assume the burden to prove to the judge that the investigator or expert was not necessary for an effective defense. If the judge rules that the expenditure was frivolous, the bill will be disallowed. When there are insufficient funds in the district's budget to pay the bill, the expert or investigator would not be paid. With this alternative, defense lawyers would be careful because they know that money spent frivolously will come out of their budgets. If experts or investigators are not paid, they will never work for the defense again. Since finding qualified investigators and experts is often difficult, defense lawyers will try not to lose them. The problem remains, however, that the final decision on what is necessary rests with the judiciary. Once the county learns that judges will be sympathetic to their complaints, they will not hesitate to challenge expenditures.

A second alternative would allow an independent third party to exercise discretion over the defense's use of investigators and experts. In Minnesota, the State Board of Public Defense might be given the authority to allocate funds. Even the use of a third party, however, does not completely eliminate the problem because the indigent's lawyer is still subject to outside scrutiny by someone potentially subject to political and fiscal pressures, while privately retained lawyers are not.

The most effective solution would be to remove judicial dis-

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140. *Id.* at 838.

141. *Id.*

142. *Id.*

cretion completely. This solution is particularly viable because of its simplicity, according to one commentator, and attractive "for its potential for eliminating abuse by courts bent on denying assistance."<sup>143</sup> Public defenders could hire full-time staff investigators and have sufficient funds in their budgets to retain experts, effectively removing federal and state statutes as barriers to the proper representation of indigent defendants. A proposal by the Minnesota State Board of Public Defense at the 1988 legislative session would have provided state funding for experts, but the bill did not pass.<sup>144</sup> According to the Chair of the Board, funding for indigent defendants was simply not a high priority for the legislature.<sup>145</sup> The Board had requested \$167,000 for a state fund from which investigators and experts could be compensated.<sup>146</sup> Without this additional money, the districts will continue to struggle to finance investigators and experts. Until the state chooses to finance indigent defense systems, the Board must approve budget increases so that each district can afford to hire investigators and experts.

## VII. Conclusion

In the historic decision *Gideon v. Wainwright*,<sup>147</sup> the United States Supreme Court held that due process obligated the states to provide indigent felony defendants with competent counsel. Twenty-two years later, the Court ruled that the right to a state-supplied expert in certain situations was an essential component of the defense.<sup>148</sup> It should not take two more decades for the Court to recognize that statutes limiting investigative and expert services to indigents through judicial discretion and strict monetary ceilings deprive them of their fourteenth and sixth amendment rights. If Learned Hand's commandment is to mean anything, indigents should have the right to effective assistance of investigators and experts in the preparation of their defenses.

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143. Note, *supra* note 24, at 1361.

144. Telephone interview with Hennepin County District Court Judge Kevin S. Burke (Apr. 28, 1988).

145. *Id.*

146. *Id.*

147. 372 U.S. 335 (1963).

148. *Ake*, 470 U.S. at 83.

## APPENDIX

ALABAMA	Ala. Code § 15-12-45 (1982) (administrative director of courts may approve expenditures for investigators and other expenses).
ALASKA	Alaska Stat. § 18.85.100 (1986) (indigent person is entitled to be represented by an attorney to the same extent as a person retaining a private attorney, including investigation and other preparation).
ARIZONA	Ariz. Rev. Stat. Ann. § 13-4013 (1978) (when charged with a capital offense, an indigent is entitled to investigators and experts reasonably necessary to present an adequate defense).
ARKANSAS	Ark. Stat. Ann. § 16-87-107 (1987) (public defenders' expenses, including experts and investigators, shall be paid by the counties in amounts approved by the courts).
CALIFORNIA	Cal. Penal Code § 987.2 (West 1985 & Supp. 1988) (the court shall determine the amount of compensation for necessary expenses to be paid out of the general fund of the county).
COLORADO	Colo. Rev. Stat. § 18-1-403 (1986) (an indigent is entitled to supporting services at state expense after demonstrating a particularized and reasonable need).
CONNECTICUT	Conn. Gen. Stat. Ann. § 51-292 (West 1958) (reasonable expenses shall be paid from the budget of the Public Defense Services Commission, upon approval by the commission).
DELAWARE	Del. Code Ann. tit. 29, § 4603 (1983) (the public defender may appoint investigators and other assistants as necessary to conduct an adequate defense).
FLORIDA	Fla. Stat. Ann. § 914.06 (West 1985 & Supp. 1988) (when an indigent requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to be paid by the county).
GEORGIA	Ga. Code Ann. § 17-12-5 (1982) (the county must pay for necessary expenses approved by the court, including costs of investigation).
HAWAII	Haw. Rev. Stat. § 802-7 (1985) (the court may direct that investigatory and expert services be provided upon a showing that they are necessary for an adequate defense).



IDAHO	Idaho Code § 19-861 (1987) (the public defender may employ investigators and other persons necessary to carry out the responsibilities of the office).
ILLINOIS	Ill. Ann. Stat. ch. 38, para. 113-3(d) (Smith-Hurd 1977 & Supp. 1988) (in capital cases the court may order the county treasurer to pay necessary expert witnesses reasonable compensation, not to exceed \$250 for each defendant).
INDIANA	Ind. Code Ann. § 33-9-10-4 (Burns 1985) (the county counsel shall appropriate an amount sufficient to meet the contract obligations of the court for services to the poor).
IOWA	Iowa Code Ann. § 331.777 (West 1983) (the public defender may appoint investigators and other employees as approved by the board).
KANSAS	Kan. Stat. Ann. § 22-4508 (1981 & Supp. 1987) (counsel may obtain investigative, expert or other services necessary to an adequate defense in an <i>ex parte</i> hearing).
KENTUCKY	Ky. Rev. Stat. Ann. § 31-110 (Michie/Bobbs-Merrill 1985) (an indigent is entitled to necessary services, including investigation and other preparation).
MAINE	Me. Rev. Stat. Ann. tit. 15, § 810 (1964).
MARYLAND	Md. Ann. Code art. 27A, § 3 (1957) (with the approval of the board of trustees, the public defender shall appoint necessary personnel such as investigators and experts).
MASSACHUSETTS	Mass. Ann. Laws ch. 280, § 4 (Law. Co-op. 1980) (costs of indigent defense may be waived by the court or paid by the Commonwealth).
MICHIGAN	Mich. Comp. Laws Ann. § 768.20(a) (West 1982 & Supp. 1988) (at the expense of the county, the defense may secure an independent psychological evaluation by a doctor of choice on the issue of insanity).
MINNESOTA	Minn. Stat. Ann. § 611.21 (1986) (counsel may obtain investigative, expert or other services necessary to an adequate defense in an <i>ex parte</i> hearing).
MISSISSIPPI	Miss. Code Ann. § 99-15-17 (1972 & Supp. 1987) (expenses may be approved by judge and paid by the county in which the prosecution commenced).

MISSOURI	Mo. Rev. Stat. § 600.040 (Vernon 1978) (the state shall pay all expenses incurred in the performance of the duties of personnel in the office of the public defender).
MONTANA	Mont. Code Ann. § 3-5-901 (1987) (the state shall fund the expense of indigent defense).
NEBRASKA	Neb. Rev. Stat. § 29-1804.12 (1985) (court shall allow expenses reasonably necessary to an effective defense).
NEVADA	Nev. Rev. Stat. § 260.040 (1986) (the public defender may appoint investigators and other employees necessary to carry out the responsibilities of the office).
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. § 604.A:6 (1986) (upon finding that investigative, expert, or other services are necessary to an adequate defense, the court shall determine reasonable compensation not to exceed three hundred dollars).
NEW JERSEY	N.J. Stat. Ann. § 2A:158A-7 (West 1985) (the public defender shall appoint investigators and other personnel required for the operation of the office).
NEW MEXICO	N.M. Stat. Ann. § 31-16-3 (1984) (an indigent person is entitled to be represented by a lawyer to the same extent as a person having his own counsel and to be provided with necessary services, including investigation and other preparation).
NEW YORK	N.Y. County Law § 722-c (McKinney 1972 & Supp. 1988) (court must find investigator or expert necessary in an <i>ex parte</i> hearing).
NORTH CAROLINA	N.C. Gen. Stat. § 7A-450 (1987) (it is the responsibility of the state to provide an indigent with counsel and other necessary expenses of representation).
NORTH DAKOTA	N.D. Cent. Code § 29-07.01.1 (1974) (an indigent is entitled to expenses necessary for an adequate defense when approved by the court).
OHIO	Ohio Rev. Code Ann. § 2941.51 (Anderson 1987) (this statute, which provides for attorney's fees, is interpreted by the courts to include expenses for defense experts. <i>O'Mally v. Layden</i> , 702 P.2d 1055 (Okla. Crim. App. 1985)).
PENNSYLVANIA	Pa. Stat. Ann. tit. 16, § 9960.5 (Purdon Supp. 1988).

RHODE ISLAND	R.I. Gen. Laws § 12-15-7 (1981) (the general assembly shall appropriate annually a sum deemed necessary for expenses incurred by the public defender in performance of his duties).
SOUTH CAROLINA	S.C. Code Ann. § 17-3-80 (Law. Co-op. 1976 & Supp. 1987) (subject to approval by the trial judge, lawyers representing indigents may be reimbursed for necessary expenses).
SOUTH DAKOTA	S.D. Codified Laws Ann. § 7-16A-6 (1981) (the board of county commissioners may employ investigators and other persons that the advisory committee considers necessary).
TENNESSEE	Tenn. Code Ann. § 8-14-103 (Supp. 1987) (statute creates a district investigator).
TEXAS	Tex. Crim. Proc. Ann. § 26.05 (Vernon 1966) (counsel shall be reimbursed for reasonable investigative and expert expenses with prior court approval).
UTAH	Utah Code Ann. § 77-32-1 (1982 & Supp. 1987) (indigents must be provided with investigators and other personnel necessary for a complete defense).
VERMONT	Vt. Stat. Ann. tit. 13, § 5254 (1974 & Supp. 1988).
VIRGINIA	Va. Code Ann. § 19.2-163 (1983 & Supp. 1988) (the circuit or district court shall direct payment of reasonable expenses incurred by a court appointed attorney).
WASHINGTON	Wash. Rev. Code Ann. § 36.26.060 (Supp. 1988) (the public defender may appoint necessary investigators and other employees, subject to the approval of the board of county commissioners).
WEST VIRGINIA	W.Va. Code § 29-21-14 (1986) (eligible public defender shall be reimbursed for investigative services and expert witnesses to a maximum of \$500 unless court approves additional compensation).
WYOMING	Wyo. Stat. § 7-6-104 (1977) (an indigent person is entitled to the necessary services of representation, including investigation and other preparation).